Supreme Court, U.S.
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No. 07-86

In The

Supreme Court of the United States

JAMES V. CROSBY, JR.,

Petitioner,

vs.

WILLIE MATHEWS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent sued Petitioner, former warden of Florida State Prison ("FSP"),[1] and several FSP employees under 42 U.S.C. §1983 alleging Defendants violated his Eighth and Fourteenth Amendment rights by subjecting him to excessive use of force, while incarcerated at FSP in 1999, resulting in injuries including a broken jaw. Respondent seeks to impose supervisory liability on Petitioner for the alleged use of excessive force by FSP correctional officers. Petitioner moved for summary judgment based on qualified immunity. The District Court granted Petitioner's Motion, holding that Petitioner was entitled to qualified immunity because there existed no triable issue as to whether Petitioner committed a constitutional violation, and finding that the record was insufficient as a matter of law to create supervisory liability for Petitioner. The Eleventh Circuit reversed and held (1) that there existed a triable issue as to Petitioner's supervisory liability based upon the failure to take reasonable steps in the face of a "history of widespread abuse" or the adoption of custom or policy which results in deliberate indifference, and (2) that Petitioner was not entitled to qualified immunity solely because, by 1999, the law subjecting prison wardens to supervisory liability for actions of subordinates was clearly established.

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[1] FSP is a Florida state maximum security facility.

QUESTIONS PRESENTED – Continued

Two questions are presented:

1. Whether the Eleventh Circuit improperly denied Petitioner entitlement to qualified immunity by applying the "clearly established law" prong of the qualified immunity analysis at a level of generality forbidden by this Court, and by failing to employ a particularized "objective legal reasonableness" standard to assess whether Petitioner could reasonably have anticipated his supervisory actions were unlawful.

2. Whether the Eleventh Circuit's decision is tantamount to an erroneous holding that the existence of a triable issue as to supervisory liability precludes entitlement to qualified immunity, effectively denying entitlement to qualified immunity in *all* supervisory liability cases.

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were Petitioner, James V. Crosby, Jr., in his individual capacity, Respondent, Willie Mathews, and Defendants Tim Giebeig, Sergeant Hall, Sergeant Crockett, C.O. Young, James Poston, Timothy Thornton, Sergeant Sauls, C.O. Beck, Charles Brown, C.O. Riner, C.O. Dent, Sergeant Davidson, and Steve Dobbs, in their individual capacities.

CORPORATE DISCLOSURE STATEMENT

No party is a corporation.

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OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Mathews v. Crosby*, 480 F.3d 1265 (11th Cir. 2007). The Eleventh Circuit reversed, in part, the January 20, 2004 Order on Defendants Crosby's and Giebeig's Motions for Summary Judgment of the United States District Court for the Middle District of Florida in *Mathews v. Crosby*, Case No. 3:99-cv-1117-J-32MMH. *See* Appendices A and B.

STATEMENT OF JURISDICTION

The basis for jurisdiction in this Court is 28 U.S.C. § 1254(1).

The Eleventh Circuit's opinion was rendered on March 16, 2007. *See* Appendix A. The Petition for Rehearing *En Banc* was denied on May 10, 2007. *See* Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this case are:

United States Constitution, Amendment VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision involved in this case is:

Title 42 United States Code § 1983.

Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On November 10, 1999, Respondent filed his Complaint and Jury Demand in the United States District

Court for the Middle District of Florida asserting a civil rights action under 42 U.S.C. § 1983. Jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343(a)(3).[2] Respondent sued Petitioner and several other FSP employees seeking compensatory and punitive damages for alleged violation of his Eighth and Fourteenth Amendment rights by subjecting him to excessive use of force, while incarcerated at FSP in 1999, resulting in injuries including a broken jaw. Respondent seeks to impose supervisory liability on Petitioner for alleged use of excessive and unjustified force by FSP correctional officers resulting in injuries to Respondent.

On November 4, 2003, Petitioner filed his Motion for Summary Judgment which asserted Petitioner's entitlement to qualified immunity. On January 20, 2004, the District Court issued its Order on Defendants Crosby's and Giebeig's Motions for Summary Judgment which, in part, granted Petitioner's Motion for Summary Judgment. Appendix B. The District Court held that Petitioner was entitled to qualified immunity because there existed no triable issue as to whether Petitioner committed a constitutional violation. The District Court found that the record was insufficient as a matter of law to create supervisory liability for Petitioner. More specifically, the District Court found (1) that the record failed to establish that Petitioner personally participated in the alleged use of excessive force against Respondent, or that there was a causal connection between the activities of Petitioner and the

[2] On June 10, 2002, Respondent filed an Amended Complaint and Jury Demand and on February 13, 2003, Respondent filed a Second Amended Complaint and Jury Demand, both of which alleged the same bases for jurisdiction.

alleged constitutional deprivation, *i.e.*, the alleged abuse of Respondent by various subordinate correctional officers; (2) that there was insufficient record evidence of either a "history of widespread abuse" or a "custom or policy" which resulted in deliberate indifference to constitutional rights; and (3) that there were no facts which supported an inference that Petitioner directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so. Appendix B at App. 32-33 n.4. The District Court directed the clerk to withhold entry of judgment until the conclusion of the case. On March 31, 2005, the District Court entered judgment in favor of Petitioner and against Respondent.

On April 16, 2005, Respondent filed a Motion for Reconsideration of Order Granting Summary Judgment in favor of Defendant Crosby and for Extension of Time to File Notice of Appeal. On April 8, 2005, the District Court denied said Motion. On May 3, 2005, Respondent timely filed a Notice of Appeal with the Court of Appeals for the Eleventh Circuit.

On March 16, 2007, the Eleventh Circuit's decision was entered reversing the District Court's granting of Petitioner's Motion for Summary Judgment. Appendix A. Petitioner timely filed his Petition for Rehearing *En Banc* on April 6, 2007. On May 10, 2007, the Eleventh Circuit denied the Petition for Rehearing *En Banc*. Appendix C.

The Eleventh Circuit found that the proffered evidence, viewed in the light most favorable to Respondent, created a triable issue as to Petitioner's supervisory liability based on (1) a "history of widespread abuse" or (2) a supervisor's custom or policy. *Mathews v. Crosby*, 480 F.3d at 1270, 1275; Appendix A at App. 6, 16-17.

The Eleventh Circuit next addressed the "clearly established law" prong of the qualified immunity analysis. It is this portion of the opinion that is the subject of the instant Petition, and it is set forth below in its entirety:

II. Clearly Establishe Law.

> Crosby argues that even if Mathews can establish a constitutional violation, Crosby is protected by qualified immunity because Mathews has failed to show that it was clearly established at the time of the beatings that a warden could face liability under § 1983 predicated on his failure to take reasonable steps in the face of a history of widespread abuse or his adoption of custom or policies which result in deliberate indifference. We disagree. By 1999, it was clearly established that a warden, the person charged with directing the governance, discipline, and policy of the prison and enforcing its orders, rules, and regulations, would bear such liability. *See, e.g., LaMarca v. Turner*, 995 F.2d 1526, 1539 (11th Cir. 1993) (holding that prison warden could face liability when his failure to take appropriate measures to improve prisoner safety created a climate which preordained the ensuing violence); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985) (holding that safety director whose responsibility included disciplining police officers and setting police department policy could be liable for failing to take corrective steps in the face of pattern of excessive force engaged in by officers); *see also Skrtich*, 280 F.3d at 1303 (stating that by 1998 "precedent clearly established that government officials may not use gratuitous force against a prisoner who has been already subdued or, as in this case, incapacitated"); *Bruce v. Wade*, 537 F.2d 850, 853

> (5th Cir. 1976) (a violation of § 1983 is clearly stated by the unjustified beating of an inmate at the hands of prison officials).

Mathews v. Crosby, 480 F.3d at 1275-1276. Thus, the Eleventh Circuit determined that Petitioner was not entitled to qualified immunity solely because the law subjecting prison wardens to supervisory liability for actions of subordinates was clearly established.[3]

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[3] The Eleventh Circuit overlooked or misapprehended Petitioner's argument regarding entitlement to qualified immunity that was not addressed or even mentioned in the Eleventh Circuit's opinion. The Eleventh Circuit's decision in error suggests that Petitioner argued that it was not clearly established in 1999 that a warden could face liability under § 1983 predicated on his failure to take reasonable steps in the face of a history of widespread abuse or his adoption of custom or policies that would result in deliberate indifference. Petitioner did not make this argument attributed to him. Rather, Petitioner argued that to overcome a defendant's qualified immunity, a plaintiff must establish that the defendant's conduct violated a clearly established statutory or constitutional right of which a reasonable person would have known. The above-quoted portion of the Eleventh Circuit's decision improperly frames the qualified immunity issue and applies the wrong test to deny Petitioner entitlement to qualified immunity. As discussed *infra*, the Eleventh Circuit's decision (1) adopts, without discussion, a qualified immunity analysis which erroneously applies the "clearly established law" test at a level of generality rejected by this Court, and without inquiring into the objective legal reasonableness of Petitioner's conduct in light of existing law, contrary to the pronouncements of this Court, and (2) is tantamount to an erroneous holding that the existence of a triable issue as to supervisory liability precludes entitlement to qualified immunity, effectively denying entitlement to qualified immunity in *all* supervisory liability cases.

REASONS FOR ALLOWANCE OF THE WRIT

This case concerns the very important matter of qualified immunity of supervisory government officials where supervisors do not personally participate in the alleged constitutional deprivation by subordinates and where subordinates are not following direction from supervisors in effecting the alleged deprivation. This Court has long recognized qualified immunity for government officials as an important principle of § 1983 jurisprudence. The qualified immunity doctrine protects public officials from the risk of potentially ruinous monetary liability which would deter qualified people from public service, and it safeguards the public interest in having government employees act with independence and without fear of consequences.

Qualified immunity shields all government officials, including supervisory officials, from liability for civil monetary damages arising from the performance of discretionary governmental functions.[4] The Eleventh Circuit's decision serves as precedent to deny *all* supervisory government officials entitlement to qualified immunity where there exists a triable issue as to supervisory liability for actions of subordinates. The decision improperly denies supervisory officials entitlement to qualified immunity by applying the "clearly established law" prong of the qualified immunity analysis at a level of generality disapproved by this Court. The decision also improperly denies supervisory officials entitlement to qualified immunity without any inquiry into the objective legal

[4] There is no question in this case that Petitioner was acting within the scope of his discretionary authority as warden of FSP. *Mathews v. Crosby*, 480 F.3d at 1269 n.4.

reasonableness of the supervisor's actions. The decision cannot be reconciled with the important principles of qualified immunity articulated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Hope v. Pelzer*, 536 U.S. 730 (2002); and *Saucier v. Katz*, 533 U.S. 194 (2001). The Eleventh Circuit's approach undermines the goals of qualified immunity by essentially eviscerating qualified immunity in supervisory liability cases.

A core principle of qualified immunity is protecting government officials, including supervisory officials, from suit when they could not reasonably anticipate that their conduct violates existing law. Objective legal reasonableness is the touchstone of the qualified immunity analysis. *Harlow*, 467 U.S. at 818-819. "[Q]ualified immunity operates 'to ensure that before they are subjected to suit, [government officials] are on notice that their conduct is unlawful.'" *Hope*, 536 U.S. at 739 (quoting *Saucier*, 533 U.S. at 206). The availability of the defense depends on whether a reasonable government official could have believed his actions to be unlawful, in light of clearly established law and the information he possessed. *See Hunter v. Bryant*, 503 U.S. 224, 227 (1991); *Anderson*, 483 U.S. at 641. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). If "it would be clear to a reasonable [government official] that his conduct was unlawful in the situation he confronted," then qualified immunity does not apply. *Saucier*, 533 U.S. at 202. But if, on the other hand "[government officials] of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

The Eleventh Circuit's decision fails to either discuss or apply these principles. The Eleventh Circuit's brief discussion of qualified immunity consists of little more than an assertion that it was clearly established that supervisory liability could be imposed where there is a causal connection between a supervisor's actions and the claimed constitutional violation by subordinates. There is no question that such was the state of the law in 1999 and now, but that is not the test for determining entitlement to qualified immunity from supervisory liability. Just as a subordinate government official may bear personal liability for his own actions under § 1983 and yet still be immune from suit, so too may a supervisory government official bear supervisory liability under § 1983 for actions of subordinates and yet still be immune from suit.

The Eleventh Circuit specifically refused to consider the argument that it was *not* clearly established that in the circumstances with which Petitioner was confronted his conduct was objectively, legally unreasonable. It simply does not follow immediately from the conclusion that it was clearly established that supervisory liability could be imposed where there is a causal connection between a supervisor's actions and the claimed constitutional violation by subordinates that Petitioner's conduct was objectively, legally unreasonable. This Court has recognized that it is inevitable that government officials will in some cases reasonably but mistakenly conclude that their conduct was not objectively, legally unreasonable, and this Court has indicated that in such cases those officials should not be held personally liable. *Anderson*, 483 U.S. at 641, citing *Malley*, 475 U.S. at 344-345. The conduct of supervisors, just as the conduct of subordinates, is subject to the "objective legal reasonableness" test.

The Eleventh Circuit phrases the "clearly established law" test not in terms of a constitutional right but in terms of a principle of supervisory liability so general that there will *always* be denial of entitlement to qualified immunity in supervisory liability cases. The Eleventh Circuit's qualified immunity analysis thus precludes the possibility that undisputed facts in a particular case will justify entitlement to qualified immunity.

The words "clearly established law" may not be construed, as the Eleventh Circuit has, so as to read the defense of qualified immunity out of federal tort law by defining "clearly established law" in the most general possible terms, so that anyone who prevails on the merits of a claim based on, for example, supervisory liability of a government official, can defeat the defense of immunity by simply pointing out that generalized principles of causation governing supervisory liability of government officials has been clearly established. The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful.

The Eleventh Circuit refused to consider the contention that government officials who are subject to supervisory liability are, as a matter of law, still entitled to qualified immunity, as qualified immunity protects those supervisory government officials who reasonably yet mistakenly believe their conduct is reasonable. Qualified immunity analysis depends on an individualized determination of the misconduct alleged, an analysis the Eleventh Circuit failed to undertake.

The Eleventh Circuit failed to properly evaluate the supervisory conduct of Petitioner by making the appropriate fact-specific inquiry into his conduct in light of the

information he possessed. The relevant fact-specific question in this case is whether it should have been clear to Petitioner, in light of the information he possessed, that his particular supervisory conduct violated the Eighth Amendment.

I. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS CONTRARY TO THE CORE QUALIFIED IMMUNITY PRINCIPLES ARTICULATED BY THIS COURT IN *HARLOW, ANDERSON, HOPE* AND *SAUCIER*.

A. The Eleventh Circuit Improperly Applied The "Clearly Established Law" Prong Of The Qualified Immunity Analysis At A Level Of Generality Forbidden By This Court.

A determination whether Petitioner is entitled to qualified immunity cannot begin with the generalized inquiry into whether the law governing the imposition of supervisory liability on government officials was clearly established. Instead, the Court must apply a more particularized inquiry, namely, whether, in the circumstances of the case, anything Petitioner did or failed to do as a supervisor was violative of clearly existing law. Even where it is true that existing law establishes the circumstances under which a causal connection exists for the imposition of supervisory liability upon a government official, this general proposition has little to do with the concept of qualified immunity. Broadly defining "clearly established law" as the Eleventh Circuit does, significantly undermines part of the rationale for the qualified immunity defense. Because *Harlow* relies upon the objective reasonableness of an official's conduct in relation to clearly

established law when determining whether a defendant is entitled to qualified immunity, generalities are just not helpful. This Court has emphasized that determining whether the law was clearly established must be "undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

The Eleventh Circuit's decision fails to recognize that despite being subject to the imposition of supervisory liability, a government official may nevertheless be shielded from liability for civil damages if his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. In *Anderson*, this Court explained that what "clearly established" means in this context depends largely "upon the generality at which the relevant 'legal rule' is to be identified." 483 U.S. at 639. Even where the general rule has long been established, for instance, that a supervisory official may be held liable for actions of subordinates based upon a recognized "causal connection," there still may be doubt as to the illegality of the supervisory defendant's particular conduct. *See id.* at 640-641. The Eleventh Circuit considered the qualified immunity question at a level of generality rejected by this Court in *Anderson*. The *Anderson* "objective legal reasonableness" test is meaningless if applied at the level of generality utilized by the Eleventh Circuit and converts the rule of qualified immunity that this Court's cases plainly establish into a rule of virtually unqualified supervisory liability in those cases where the evidence is sufficient to impose supervisory liability.

The Eleventh Circuit's approach leaves no room for mistaken judgments by supervisory government officials. But the qualified immunity standard is intended to give

"ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229 (citing *Malley*, 475 U.S. at 343, 341). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)). The Eleventh Circuit engaged in a qualified immunity analysis which too broadly risks permitting unwarranted imposition of monetary liability on, and denial of qualified immunity to supervisory government officials even when they reasonably believe their actions are not unlawful. The Eleventh Circuit's approach does not provide for the accommodation of reasonable error on the part of governmental supervisors.

B. The Eleventh Circuit Improperly Refused To Employ An "Objective Legal Reasonableness" Standard To Assess Whether Petitioner Could Reasonably Have Anticipated That His Supervisory Conduct Was Unlawful Under Existing Law.

The Eleventh Circuit erred not only by defining the question at too high a level of generality, but by failing to assess the "objective legal reasonableness" of Petitioner's actions. Government officials, including supervisory officials, performing discretionary functions generally are granted a qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818; *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). "What this means in practice is 'whether an

official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.'" *Wilson v. Layne*, 426 U.S. 603, 614 (1999) (quoting *Anderson*, 483 U.S. at 639); *see also Graham v. Connor*, 490 U.S. 386, 397 (1989).

In *Anderson*, this Court emphasized that reviewing Courts engaging in a qualified immunity analysis must employ, under the clearly established law prong of the qualified immunity analysis, a particularized objective legal reasonableness standard to assess whether the government official could reasonably have anticipated his actions violated existing law:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity

> into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis, supra*, 468 U.S. at 195, 104 S. Ct. at 3019. It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson, 483 U.S. at 639-640 (footnote omitted). It follows from what this Court has said that the determination whether it was objectively legally reasonable to conclude that a government official's actions were not unlawful will often require examination of the information possessed by the government official. *Id.* at 641.

Objective legal reasonableness is a concept that developed in the prototypical § 1983 context – a context in which a state actor ("A") inflicts injury directly on a victim ("B") in derogation of B's constitutionally protected rights. In the supervisory liability context, the focus of the qualified immunity inquiry shifts, but the objective legal reasonableness test remains intact. Where the context shifts, as where A is not a direct actor (*i.e.*, he himself did not perpetrate the constitutional deprivation) but, rather, stands accused of permitting a third person ("C"), also a state actor, to violate B's rights, the test remains intact, but its focus shifts. In this tri-cornered situation, the focus

of the objective legal reasonableness test and, hence qualified immunity, is necessarily on the conduct of the supervisor rather than the subordinate. But the supervisor's entitlement to qualified immunity is still measured by the objective legal reasonableness of his conduct. The failure to assess the objective legal reasonableness of the supervisor's conduct, as the Eleventh Circuit did in this case, contravenes the axiom that the actions of persons sued in their individual capacities under § 1983 must be assessed on their own terms. *See Harlow*, 457 U.S. at 818-19.

In determining the validity of a qualified immunity defense, the issue is not, as posed by the Eleventh Circuit, whether the Defendant acted wrongly, but whether reasonable persons would know that they acted in a manner that deprived another of a known constitutional right. The classic question that a qualified immunity defense poses is whether the allegedly violated federal right was established with sufficient clarity that a reasonable government official should have conformed his conduct accordingly. *See Anderson*, 483 U.S. at 638. In answering this question, the Eleventh Circuit should have, but did not, undertake an objective inquiry into the totality of the circumstances, with a view toward ascertaining whether the right allegedly infringed, articulated at an appropriate level of particularity, was settled at the time of Petitioner's action, and if so, whether Petitioner's conduct was obviously inconsistent with that right. *See id.* at 638-40. In the last analysis, the purpose of qualified immunity is to protect government functionaries who could not reasonably have anticipated that their actions would abridge the rights of others, even though, at the end of the day, those officials may have engaged in rights-violating conduct. *See id.* at 639-41.

The deference owed government officials facing supervisory liability in suits alleging excessive force in violation of the Eighth Amendment is not different in some qualitative respects from the probable-cause inquiry under *Anderson* in Fourth Amendment cases. Government officials facing supervisory liability in Eighth Amendment cases can have reasonable, but mistaken, beliefs as to the legality of their actions as supervisors. In such Eighth Amendment cases, the reasoning of *Anderson* still operates to grant government officials immunity for reasonable mistakes as to the legality of their actions. In other words, although there may exist a triable issue as to supervisory liability in an Eighth Amendment claim, the supervisory government official will still be protected by qualified immunity if the legal constraints on his conduct were not clear at the time.

C. The Cases Relied Upon By The Eleventh Circuit Did Not Provide Petitioner "Fair Warning" That His Conduct Was Unlawful.

The test of qualified immunity is not whether the conduct at issue is clearly lawful, but whether it is clearly unlawful. The test for qualified immunity does not focus on whether courts have specifically sanctioned particular conduct. The correct inquiry is whether courts have found conduct unlawful or defined a constitutional right in such a way a reasonable official would understand that what he is doing violates that right.

In conducting this inquiry, it is crucial to look at precedent applying the relevant legal rule in similar factual circumstances. Such cases give government officials the best indication of what conduct is unlawful in a given situation. "This is not to say that an official action is

protected by qualified immunity unless the very action in question has previously been unlawful, but it is to say in light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citations omitted). In effect, the qualified immunity test is simply the adaptation of the fair warning standard to give officials, including supervisory officials (and, ultimately, governments), the same protection from civil liability and its consequences that individuals have traditionally faced in vague criminal statutes. *United States v. Lanier*, 520 U.S. 259, 270-271 (1997). This Court reaffirmed *Lanier* in *Hope v. Pelzer*, 536 U.S. 730. In *Hope* this Court explained that qualified immunity depends on whether prior decisions gave reasonable fair warning that the conduct at issue violated existing law. 536 U.S. at 740 (quoting *Lanier*, 520 U.S. at 269).

In the instant case, this determination depends on whether the law in 1999 gave Petitioner fair warning that his alleged action violated existing law. The general statement of the law pertaining to supervisory liability, as articulated by the Eleventh Circuit, did not give Petitioner fair and clear warning that his conduct at issue was unlawful. Pursuant to *Lanier*, as reaffirmed in *Hope*, the salient question that the Eleventh Circuit ought to have asked, but did not, is whether the state of the law in 1999 gave Petitioner fair warning that his conduct violated Eighth Amendment rights. It did not. Simply put, neither the Eleventh Circuit nor Respondent has identified any case that gave Petitioner "fair warning" that any supervisory conduct on his part was unlawful.

The Eleventh Circuit cites four cases in its brief paragraph concerning "clearly established law," without discussion as to how any of these cases provided Petitioner

fair warning that any supervisory conduct on his part as warden violated inmates' Eighth Amendment rights. The four cases cited by the Eleventh Circuit are: *LaMarca v. Turner*, 995 F.2d 1526, 1539 (11th Cir. 1993); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1985); *Skrtich v. Thornton*, 280 F.3d 1295, 1303 (11th Cir. 2002); and *Bruce v. Wade*, 537 F.2d 850, 853 (5th Cir. 1976).

First, *Skrtich* is a 2002 decision and, therefore, is irrelevant in determining whether Petitioner had fair warning that his conduct was unlawful in 1999 when the alleged incident occurred. Second, *Bruce v. Wade* is cited by the Eleventh Circuit for the proposition that a violation of § 1983 is clearly stated by the unjustified beating of an inmate at the hands of prison officials. But the question in this case is not whether, in general, Respondent had a right under the Eighth Amendment to be free from violent attacks at the hands of subordinate correctional officers. He clearly did. Instead, the question that must be asked is required to be much more fact specific and must be asked with respect to Petitioner's conduct.

In *Bruce v. Wade*, the plaintiff alleged that the chief jailor, the supervisory official, *ordered* the beating of the jail inmate. In this case, however, there is no evidence that Petitioner personally participated in the beating of Respondent, or that any guards were following specific direction from Petitioner in using excessive force against Respondent. The Eleventh Circuit fails to explain how *Bruce v. Wade* provided Petitioner fair warning that his supervisory conduct violated the Eighth Amendment, given that Petitioner did not order and had no involvement whatsoever in the alleged use of excessive force by subordinate correctional officers. *Bruce v. Wade* did not provide petitioner fair warning that his conduct as warden

– not the conduct of the subordinate correctional officers who personally participated in the alleged use of excessive force – was unlawful. That correctional officers who personally participated in the use of excessive force violated Respondent's clearly established Eighth Amendment rights does nothing to overcome Petitioner's assertion of qualified immunity.

Third, neither *Fundiller* nor *LaMarca* provided Petitioner fair warning that any supervisory conduct on his part was unlawful. *Fundiller* did not clearly establish any law pertaining to supervisory liability for Eighth Amendment deprivations. In *Fundiller*, the court addressed whether the allegations in a complaint under § 1983 for denial of Fifth and Fourteenth Amendment due process rights were sufficient to withstand a motion to dismiss. In *Fundiller*, the plaintiff alleged that the public safety director was aware of the inadequate investigation of the background of police applicants before hiring them and was aware of the course of conduct engaged in by police officers including repeated failures to follow police procedure, unnecessary use of force, roughness, and shootings at the time of making arrests, intimidation during arrests and booking procedures, and drug trafficking. *Fundiller* has nothing to do with establishing the parameters under which a prison warden may be subjected to supervisory liability for deprivation of inmates' Eighth Amendment rights by subordinate correctional officers.

Finally, the evidence in *LaMarca* was significantly different from the proffered evidence in this case, and the decision was primarily concerned with the correct legal standards to be employed by the trial court and the proper development of the record. *LaMarca* involved, unlike the

instant case, *substantiated* occurrences of widespread physical inmate-on-inmate violence and assault over a three-year period. Evidence showed that correctional officers' view of inmates within the dormitories was obstructed and correctional officers were supposed to patrol the interiors of dormitories regularly but did not. Prison cells for disciplinary, administrative, and protective confinement suffered from substandard conditions including lack of adequate ventilation, poor lighting and infestation with roaches and vermin. Prisoners were allowed little or no exercise, only three showers a week, no canteen privileges, and only limited use of the law library. Confinement areas failed to insulate inmates from their tormentors because inmates from the general population could gain access to confinement areas by crawling under a poorly maintained fence. An inordinate number of inmates requested protective confinement, leading to overcrowding. Conditions in protective confinement were substandard and discouraged inmates from remaining in this potential safe-haven. The defendant superintendent's own letter to his superior described the prevailing atmosphere at the institution as follows: "On an almost daily basis I feel that our security staff is simply being tolerated by the inmate population rather than being in control of the operation of the institution." The defendant superintendent in *LaMarca* also confirmed that low morale among the prison's staff, high employee turnover (leading to a less experienced staff), high vacancy rates for staff positions, and inadequate supervision of employees had a direct effect on the prison's ability to maintain security. The presence of contraband (weapons, alcohol, and drugs), corruption of the institutional staff, inmate violence and homosexual activity were accepted as part of prison life at the institution. Excessive quantities of contraband flowed

freely into and within the prison. Prison officials made "little or no effort . . . to control illicit activity at the institution. Inmates carried knives and openly used drugs." The contraband problem was compounded by staff corruption, as prison officials contributed to, and apparently profited from, the contraband, and utilized prisoners to "control" and punish other prisoners. Correctional staff permitted regular, unsupervised showing of hard-core pornographic movies which would serve only to maximize the possibility of sexual and other violence, and during the showing of which sounds of inmates screaming and crying could be heard. Rather than offer help, the staff suggested that the inmates deal with their problems "like men," that is, use physical force against the aggressive inmate. Standard operating procedures were insufficient to protect prisoner safety. Procedures for investigating homosexual rapes were not followed and some reported incidents were not investigated at all. Aggression was commonplace and exacerbated by the readily available contraband and an excessively permissive atmosphere. *LaMarca*, 995 F. 2d at 1532-33.

Clearly, the evidence in *LaMarca* and the allegations in *Fundiller* showed the existence and supervisory knowledge of an extensive pattern of egregious substantiated misconduct which is *simply not present in the instant case*. The evidence in *LaMarca* and the allegations in *Fundiller* are just too different from those of this case to support a conclusion that it was clearly established in a particularized way that the conduct of Petitioner in this case was unlawful. The decisions in *LaMarca* or *Fundiller* are plainly insufficient to give Petitioner fair warning that the supervisory conduct in which he engaged ran afoul of Respondent's Eighth Amendment rights.

II. REVIEW IS WARRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS TANTAMOUNT TO AN ERRONEOUS HOLDING THAT THE EXISTENCE OF A TRIABLE ISSUE AS TO SUPERVISORY LIABILITY PRECLUDES ENTITLEMENT TO QUALIFIED IMMUNITY, EFFECTIVELY DENYING ENTITLEMENT TO QUALIFIED IMMUNITY IN *ALL* SUPERVISORY LIABILITY CASES.

The Eleventh Circuit essentially improperly concluded that resolution of the supervisory liability issue, that is, a finding that there is a triable issue as to supervisory liability, is necessarily determinative that Petitioner is not entitled to qualified immunity because the law governing supervisory liability was clearly established. However, the qualified immunity inquiry has a further dimension, separate and apart from the principle of supervisory liability. Immunity contemplates exemption from liability, including supervisory liability, that otherwise might exist on the merits. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular government official conduct. *Saucier*, 533 U.S. at 205. It is sometimes difficult for a government official to determine how the relevant legal doctrine will apply to the factual situation the government official confronts. *Id.* A government official might correctly perceive all of the relevant facts but have a mistaken understanding as to whether his particular action or inaction is unlawful in those circumstances. *Id.* If the government official's mistake as to what the law requires is reasonable, however, the government official is entitled to the immunity defense. *Id.* Qualified immunity looks to the reasonableness of the government official's belief that he did not act unlawfully *after* it has been

determined that the evidence is sufficient to show that the government official was unreasonable in his or her conduct. *See id.* 533 U.S. at 201-203. Similarly, in the supervisory liability context, qualified immunity looks to the reasonableness of the supervisory government official's belief that he did not act unlawfully *after* it has been determined that there exists a triable issue as to supervisory liability.

The Eleventh Circuit's analysis in the instant case, however, is tantamount to a holding that a finding of a triable issue as to supervisory liability necessarily precludes a finding of qualified immunity. But this Court's reasoning in *Saucier* requires an additional inquiry into whether a reasonable government official would have understood that his conduct was impermissible under the Eighth Amendment. Even though this Eighth Amendment case ultimately turns on the issue of Petitioner's state of mind (deliberate indifference to a substantial risk of serious harm), the Eleventh Circuit should have still considered whether, assuming the facts in the Respondent's favor, it would be clear to a reasonable government official that Petitioner's conduct was unlawful. The Eleventh Circuit's analysis stops short of this step.

In *Saucier*, the claim involved excessive use of force in making an arrest; the arresting officer asserted qualified immunity; the Ninth Circuit held that summary judgment based on qualified immunity was inappropriate because the constitutional inquiry – whether unreasonable force was used in making the arrest – and the inquiry on qualified immunity were the same. The Ninth Circuit reasoned that both concern the objective reasonableness of the officer's conduct in light of the circumstances that he confronted. This Court reversed, observing that the goal of

qualified immunity would be undermined if summary judgment were denied every time a material issue of fact remains on an excessive force claim. *Saucier*, 533 U.S. at 202. The same is true in this Eighth Amendment case. The goal of qualified immunity would be undermined if summary judgment were denied every time a material issue of fact remains on a supervisory liability claim.

Saucier's key point is that the qualified immunity inquiry is separate from the constitutional inquiry. In the Fourth Amendment context, this Court rejected the view that the inquiries merge because a reasonable officer could not possibly think it was reasonable, *i.e.*, lawful to use unreasonable force. It is no less true for purposes of the Eighth Amendment than it was in *Saucier* that the qualified immunity inquiry "has a further dimension." *Id.* at 205; *see Hope v. Pelzer*, 536 U.S. at 739-45. (applying *Saucier* in an Eighth Amendment case and separately analyzing the qualified immunity and constitutional inquiries).

In *Saucier*, this Court held that the qualified immunity analysis and the Fourth Amendment analysis were distinct. Qualified immunity may protect a government official, even a government official who uses objectively unreasonable force under the Fourth Amendment. The same is true in a case involving Eighth Amendment supervisory liability. The qualified immunity analysis and the supervisory liability analysis are distinct. Qualified immunity may protect a government official, even a government official for whom there exists a triable issue as to Eighth Amendment supervisory liability for use of excessive force by subordinates. A government official may be protected by qualified immunity if the legal constraints on his conduct were not clear at the time.

While Eighth Amendment claims depend in part on a subjective test that does not fit easily with the qualified immunity inquiry, there is an objective component as well. To violate the Eighth Amendment, the deprivation must *objectively* be sufficiently serious; and the prison official must *subjectively* have a sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A determination whether it was objectively legally reasonable to conclude that a supervisory government official's particular actions in this Eighth Amendment context were not unlawful requires examination of the information possessed by the government official. *Anderson*, 483 U.S. at 641. This does not, however, reintroduce into the qualified immunity analysis the inquiry into the officials' subjective intent that *Harlow* sought to minimize. *Id.* at 641; *see Harlow*, 457 U.S. at 815-820. A reasonable prison official understanding that he cannot recklessly disregard a substantial risk of serious harm, could know all the facts yet mistakenly, but reasonably, perceive that the exposure in any given situation was not that high. In these circumstances, the prison official would be entitled to qualified immunity. *See Saucier*, 533 U.S. at 205.

The Eleventh Circuit's approach must give way to *Saucier's* in this Eighth Amendment case. Courts may not simply stop, as the Eleventh Circuit effectively did in the instant case, with a determination that a triable issue of fact exists as to whether a prison official faces supervisory liability or was deliberately indifferent; instead, the qualified immunity inquiry is separate from the supervisory liability or deliberately indifferent inquiry, and courts must undertake the qualified immunity analysis separately. The Eleventh Circuit's failure to conduct this separate analysis of the qualified immunity issue effectively results in

improper denial of qualified immunity to *all* supervisory government officials.

CONCLUSION

It is most unfortunate that the Eleventh Circuit held that Petitioner was not entitled to qualified immunity. It was not at all clear in 1999 that Petitioner's supervisory conduct violated the Eighth Amendment. It is impossible to conclude in this case that Petitioner was either "plainly incompetent" or "knowingly violate[d] the law" by any of his supervisory conduct in this case. *See Malley*, 475 U.S. at 341. For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

480 F.3d 1265 [PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12515

D.C. Docket No. 99-01117-CV-J-32-MMH

WILLIE MATHEWS,

Plaintiff-Appellant,

versus

JAMES V. CROSBY, JR.,
TIM GIEBEIG,
SGT. HALL,
SGT. CROCKETT,
C.O. YOUNG, in their individual capacities,
et al.,

Defendants-Appellees.

C.O. DOBSON, et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida

(Filed March 16, 2007)

Before TJOFLAT, BARKETT, and GOODWIN,* Circuit Judges.

BARKETT, Circuit Judge:

Willie Mathews appeals the grant of summary judgment in favor of James V. Crosby, former warden at Florida State Prison ("FSP"),[1] and Tim Giebeig, former inspector at FSP, on the grounds that they were immune from suit on the basis of qualified immunity. Mathews also appeals the district court's order granting costs and the amount of those costs to Crosby, Giebeig, and other FSP employees who were voluntarily dismissed before trial.[2]

While Crosby was the warden of FSP, Mathews was transferred to FSP and housed on X-wing, where inmates with the most serious disciplinary problems were assigned. Mathews sued Crosby, Giebeig, and several other FSP employees, alleging, *inter alia,* that they violated his Eighth and Fourteenth Amendment rights by subjecting him to a series of attacks in which excessive and unjustified force was used, resulting in serious injury, including a broken jaw. Mathews alleged that prison guards repeatedly beat him, and that Crosby knew about the general propensity for violence against inmates at FSP – especially by certain corrections officers who were involved in the beatings of Mathews – but that Crosby was deliberately

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* Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1] FSP is a Florida state maximum security facility.

[2] Specifically, Mathews appeals the following cost judgments: $11,333.00 to Crosby and Giebeig; $4,619.40 to James Poston; $6,780.29 to Timothy Thornton, Sgt. Sauls, C.O. Beck, and Charles Brown; and $10,448.59 to Sgt. Hall, C.O. Riner, C.O. Dent, Sgt. Davidson, C.O. Young, Sgt. Crockett, and Steve Dobbs.

indifferent to the risk of abuse and deliberately indifferent to Mathews' serious medical needs. Crosby and Giebeig moved for summary judgment, and the district court granted it, finding they could not be held liable for their acts as supervisory officials. For the following reasons, we reverse the district court's order granting summary judgment to Crosby, affirm the district court's order granting summary judgement to Giebeig,[3] affirm the district court's order granting costs to all defendants, except Crosby and Giebeig, and remand for further proceedings consistent with this opinion.

STANDARD OF REVIEW

We review *de novo* a district court's ruling on summary judgment, applying the same legal standards as the district court. *Skrtich v. Thornton,* 280 F.3d 1295, 1299 (11th Cir. 2002). Summary judgment is appropriate only when the evidence before the court demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence must be viewed in the light most favorable to the non-moving party. *Skrtich,* 280 F.3d at 1299 (citing *Augusta Iron and Steel Works, Inc. v.*

[3] Mathews' brief fails to set forth any arguments as to how, if at all, the district court erred by granting summary judgment to Giebeig. Mathews names Giebeig in two point headings, but does not direct any of his argument to Giebeig, and only a peripheral part of his factual analysis to Giebeig. Accordingly, we find that he has waived his claims on appeal against Giebeig. *See Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1573 n. 6 (11th Cir. 1989) (stating that passing references to issues are insufficient to raise a claim for appeal, and such issues are deemed abandoned (citing *Tedder v. F.M.C. Corp.,* 590 F.2d 115, 117 (5th Cir. 1979); *Davis v. Hill Engineering, Inc.,* 549 F.2d 314, 324 (5th Cir. 1977))).

Employers Ins. of Wausau, 835 F.2d 855, 856 (11th Cir. 1988)). That is, courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and "when conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's version." *Evans v. Stephens,* 407 F.3d 1272, 1278 (11th Cir. 2005) (emphasis omitted). Even though the "'facts,' as accepted at the summary judgment stage of the proceedings, may not be the 'actual' facts of the case," *Priester v. City of Riviera Beach,* 208 F.3d 919, 925 n.3 (11th Cir. 2000), our analysis for purposes of summary judgment must begin with a description of the facts in the light most favorable to the plaintiff, *Skrtich,* 280 F.3d at 1299.

DISCUSSION

As we have often stated, "[q]ualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Lee v. Ferraro,* 284 F.3d 1188, 1193-94 (11th Cir. 2002) (internal citations and quotation marks omitted). In order to receive the protection of qualified immunity, the government official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Kesinger v. Herrington,* 381 F.3d 1243, 1248 (11th Cir. 2004) (citing *Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002)).[4]

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[4] There is no question in this case that Crosby was acting within the scope of his discretionary authority as warden of FSP.

Once eligibility for qualified immunity is established, the burden shifts to the plaintiff to show that qualified immunity is not appropriate. *Lee,* 284 F.3d at 1194. This step consists of a two-part inquiry, set forth in *Saucier v. Katz,* 533 U.S. 194 (2001). First, we ask, "do the facts alleged show the government official's conduct violated a constitutional right?" *Id.* at 201. If a constitutional violation is established, based on the facts in the light most favorable to the plaintiff, we then must determine whether such conduct would have violated federal law that was clearly established at the time of the incident. *Garrett v. Athens-Clarke County,* 378 F.3d 1274, 1278-79 (11th Cir. 2004) (citing *Saucier,* 533 U.S. at 201-02).

I. Constitutional Claims

We first address the question of whether Crosby violated Mathews' Eighth Amendment right to be free from cruel and unusual punishment. "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, 832 (1994) (citations and quotation marks omitted). "In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners." *Id.* "Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." *Id.* at 833 (citations and quotation marks omitted).

We have held that supervisors can be held liable for subordinates' constitutional violations on the basis of supervisory liability under 42 U.S.C. § 1983. *Cottone v. Jenne,* 326 F.3d 1352, 1360 (11th Cir. 2003). Supervisory liability under § 1983 occurs "when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation." *Id.* The question before us on appeal is whether there was a causal connection between Crosby's actions or inaction and the beatings suffered by Mathews.

A causal connection may be established when: 1) a "history of widespread abuse" puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; 2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so. *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003).

Therefore, we next examine whether the district court erred in concluding that insufficient facts were presented to support liability against Crosby through a causal connection between his actions and the alleged constitutional deprivation committed by Crosby's subordinates.

A.

The facts, construed in the light most favorable to Mathews, the nonmoving party, are as follows. Willie Mathews arrived at FSP on July 4, 1999, along with four other inmates from Hamilton Correctional Institution

following an incident in which they were accused of assaulting two correctional officers. At FSP, Mathews was placed in isolation on X-wing. On or about July 4, 5, and 10, Mathews claims he was beaten by corrections officers because of the incident at Hamilton. He claims that on or about July 12, 1999, his mother called warden Crosby to inform him that she had received a letter from an officer working at the prison, stating that her son was in danger and was being abused by prison guards. The same day, Mathews was visited by Giebeig, the on-site inspector at FSP. Mathews told Giebeig that he had been repeatedly beaten. Mathews was seen by a doctor, but no other action was taken to protect Mathews from further beatings or to determine the validity of the allegations.

Giebeig testified that he "had conversations with [Crosby] every day on everything going on at FSP" and that therefore the inspector was "almost positive" that by July 13, 1999, Crosby was aware of Mathews' allegations that he was being repeatedly attacked. The inspector later testified that he was "sure somewhere between the 13th and the . . . 16th" of July 1999, he "spoke with [Crosby] . . . concerning the Mathews allegations."

On July 15, 1999, Mathews filed an emergency grievance stating that he was in fear for his life and was suffering from an untreated broken jaw following repeated assaults by prison guards on X-wing. Mathews urged authorities to send someone to remove him from X-wing "before [he is] killed." By July 16, 1999, Giebeig was advised by dental staff that Mathews had a fractured jaw. Giebeig claims he reported this information to the acting warden, A.D. Thornton. FSP had procedures which required officers to document any use of force against inmates on an official use of force form. Copies of the use of

force forms were forwarded to the warden. No use of force forms were completed in this case to explain the cause of Mathews' injury.

On July 17, 1999, another inmate, Frank Valdes, housed on X-wing, was repeatedly beaten and killed by several officers, including Timothy Thornton, one of the defendants in this case.[5] Only after that incident was Mathews transferred from FSP and surgery was performed on his fractured jaw. Based on these facts, we are satisfied that a jury could find that guards at FSP committed a constitutional violation and thus, we turn to the issue of whether Crosby can be held liable as a supervisor for that constitutional violation.

B.

Construed in the light most favorable to Mathews, the nonmoving party, the facts pertaining to whether Crosby was put on notice by a history of widespread abuse at FSP, or whether he had established customs or policies resulting in deliberate indifference to a prisoner's constitutional rights, reflect the following.[6] Crosby was preceded as warden of FSP by Ron McAndrew.[7] Warden McAndrew testified that when Crosby succeeded him as FSP warden, the two had several phone conversations (Crosby declined

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[5] *See Valdes v. Crosby*, No. 05-13065, ___ F.3d ___ (11th Cir. 2006).

[6] We repeat many of the factual allegations set forth in *Valdes*, No. 05-13065, ___ F.3d ___, as the depositions we rely on in this case were also submitted in *Valdes*.

[7] McAndrew testified that he had over twenty years of experience as an officer, sergeant, lieutenant, investigatory, deputy warden, and warden of another Florida state facility before becoming warden of FSP.

McAndrew's invitation to meet in person). In those conversations, McAndrew specifically warned Crosby about certain guards, who McAndrew believed were abusive toward inmates and needed to be kept out of high profile areas, such as X-wing, because "[t]hey were out of hand and [McAndrew] was afraid they would kill an inmate." McAndrew also taped a list of these guards to the center drawer of the warden's desk.

One of the guards that McAndrew testified he specifically warned Crosby about was Timothy Thornton, one of the defendant officers in this case accused of overseeing at least one of the beatings suffered by Mathews. When McAndrew left FSP in February 1998, Timothy Thornton had recently been one of the guards involved when a prisoner was extracted from his cell in X-wing and beaten so severely that the prisoner had to be "airlifted by helicopter to a hospital, where he remained for nine days and was treated for extensive injuries and spent several months recuperating." *Skrtich,* 280 F.3d at 1300. The inmate's injuries from that incident included "(1) left chest trauma with multiple fractures to the left ribs and left hemopneumothorax, (2) back injury with fractured multiple transverse processes, (3) right scalp laceration, (4) left shoulder and right knee injury, (5) abdominal trauma, and (6) post trauma anemia." *Id.* The inmate's chest "revealed the presence of an extensive amount of injuries with multiple abrasions and contusions and several markings of shoes on his back and left chest," which markings a doctor found "were probably made from a stomping motion as opposed to

merely holding [the inmate] down," "consistent with physical abuse." *Id.* (internal quotation marks omitted).[8]

McAndrew further testified that he moved Thornton off of X-wing and away from areas where he thought Thornton would have opportunities to abuse inmates. McAndrew testified that shortly after he became warden he wanted to terminate Thornton. McAndrew described Thornton as "an extremely dangerous person .... [T]his guy's a walking hand grenade ... and the pin's pulled." McAndrew specifically told Crosby "this guy is dangerous .... You need to get him off the payroll." However, McAndrew only reprimanded Thornton based in part on the advice of two of his subordinates, who advised McAndrew that Crosby (who at the time was the state corrections department Director of Security and Institutional Management), had called them to intervene on Thornton's behalf to ask that he be given every possible consideration. Deputy Warden A.D. Thornton, no relation to Timothy Thornton, similarly testified that both he and McAndrew had concerns about Timothy Thornton. Notwithstanding McAndrew's briefing on Thornton, after Crosby became the FSP warden, Timothy Thornton was promoted to Captain, was permitted to work on X-wing, and was personally selected by Crosby to receive preferential staff housing. In his deposition, McAndrew summarized Crosby's approach to Thornton as "[Crosby was] told he has a potential killer on his hands and he promotes the guy from lieutenant to captain."

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[8] In *Skrtich*, we held that the officer defendants were not entitled to qualified immunity for the alleged beating of Skrtich. *Skrtich*, 280 F.3d 1295.

McAndrew further testified that he asked Crosby to sit with him for a "desk audit" to review all issues and problems McAndrew was passing on to Crosby. He wanted to have the "desk audit" with Crosby because FSP "had a notorious reputation for the beating of inmates" and McAndrew was attempting to address the problem. Crosby, however, said he did not have time or was not interested in meeting for the "desk audit."

A.D. Thornton also testified that Crosby was instrumental in bringing Montrez Lucas to FSP from another correctional institution where he had worked with Crosby. Lucas had been disciplined before being brought to FSP by Crosby. Lucas bragged about how he had been suspended for using excessive force against an inmate but had not been terminated for it. In addition, shortly after Mathews was beaten, Lucas was investigated for teaching correctional officer trainees improper practices in June 1999, prior to the Mathews beating. The Department of Corrections' investigation report stated that Lucas taught the following techniques: taking "free shots" at inmates while they were handcuffed, using chemical agents on inmates without the required notice and even after inmates became compliant, reviewing medical reports before completing use-of-force forms to ensure conformity between the two, instructing trainees about which areas of the human body could be kicked without leaving bootprints, and bringing inmates to the medical ward for treatment of minor injuries and then beating the inmates severely after they had been returned to their cells.

McAndrew stated that while he was warden he hired an "assistant warden who was aggressively helping fight the excessive use of force in the prison." McAndrew specifically hired this assistant warden because he believed

the assistant warden could be trusted and would actively pursue McAndrew's goals of reducing inmate abuse. When Crosby became warden, he "transfer[red] her out to another prison."

Additionally, evidence was presented that FSP, like most facilities, had procedures for extracting inmates from their cells when they refused to submit to being restrained by handcuffs and leg irons. On X-wing, cell extractions consisted of four or five officers using the physical force necessary to restrain and remove an inmate from his cell. Cell extractions and any other use of force were to be documented by prison officials. Copies of the use-of-force forms were forwarded to the warden.

Prior wardens at FSP required officials to videotape cell extractions. Warden McAndrew testified that his predecessor at FSP suggested videotaping cell extractions as a method to cut down on problems during uses of force. McAndrew testified that FSP had a "notorious reputation" as an institution where guards beat the inmates, and he continued videotaping because he felt staff were more likely to act professionally and inmates were less likely to resist the commands of the guards when they knew they were being videotaped. When Crosby became warden, however, he discontinued the practice of videotaping cell extractions. Viewing all facts and inferences in the light most favorable to Mathews, it could be inferred that Crosby's action in discontinuing the use of the cameras once he became warden, despite knowledge that specific FSP officers were suspected of unwarranted assaults upon inmates, sent a message to corrections officers that the

administration at FSP was going to permit further abuse of inmates.[9]

Reverend Andrew MacRae, an FSP prison chaplain from 1994 until August 1999, testified about the marked difference in the culture at FSP after Crosby became the warden. MacRae testified that although he never witnessed an inmate being physically abused during any warden's administration, Crosby had a more "hands-off" approach than prior wardens had, thus permitting the "good old boys" network of guards to mistreat inmates. MacRae testified that after Crosby became warden, there were occasions when MacRae was prevented from seeing inmates following uses of force – which previously had been a time that he would often offer counsel to those inmates. MacRae was also familiar with the practice of "touching up" an inmate, wherein an inmate would be subjected to minor injuries during an apparently justifiable use of force and then, following corroboration of the injuries by the medical facility, the inmate would be returned to X-wing and beaten. MacRae testified that he believed these instances increased during Crosby's tenure because of Crosby's hands-off approach.

Evidence was also provided regarding the manner in which Crosby handled abuse-of-force complaints from inmates. FSP's procedures relating to prisoners' abuse-of-force complaints required inmates to report an accusation on a grievance form that would then be forwarded to the Inspector General's central office via an on-site prison

[9] In a March 25, 1999, meeting of FSP supervisory personnel allegedly attended by Crosby, there was a discussion about the frequency with which certain officers were being accused of abusing inmates and what steps might be taken to remedy the situation.

inspector's report. The central office would review the reports and respond to the on-site prison inspector regarding what further action, if any, should be taken by the inspector. Copies of the inspector's report to the central office and copies of the central office's response would be forwarded to the warden. The central office also would receive inquiries about prison conditions from persons outside the prison, such as an inmate's family or government officials whom an inmate or his family may have contacted. Copies of the documentation of such inquiries and directions about what action would be taken were also forwarded to the warden.

Evidence was submitted that despite having the abuse-of-force complaints and use-of-force forms forwarded to him, Crosby did not read them. Rather, Crosby delegated the responsibility of handling the complaints to his secretary, who had no law enforcement background. In his deposition, McAndrew stated that he had "reasons" to believe that the secretary was obstructing inmate abuse investigations. McAndrew told Crosby about his concerns relating to the secretary. Nonetheless, Crosby delegated the responsibility for reviewing and acting on inmate complaints to the secretary. Nearly all of the inmate-related correspondence set forth below regarding alleged abuse contained notations of an "r" next to Crosby's initials, which Crosby testified indicated that his secretary may have handled the matter without him becoming involved or having specific knowledge of the complaints or the secretary's responses.

Included in the numerous complaints and inquiries sent to Crosby between December 1998 and July 1999 were a reference to an inmate's complaint that he was "being maliciously harassed and threatened by staff" who

"threatened to kill" the inmate and that his efforts to remedy the issue at the institutional level had been "to no avail"; an inmate's complaint that officers were falsifying disciplinary reports against him as a means to keep him in close management confinement; a complaint from an inmate's spouse stating that FSP staff had locked her husband in a stripped cell, were depriving him of food and were "threatening to physically abuse" him; an inmate's letter "concerning drug dealing and physical abuse by staff" which also notes that the Department of Corrections agreed to take steps to ensure that the inmate's safety would not be jeopardized because of his testimony as a witness; an inquiry on behalf of an inmate's family members who were "concerned about the inmate's safety since they allege he was beaten by [a sergeant and] was taken to the hospital for sustained injuries" and had not had contact with him since; an inmate who wrote "alleging fear for [his] life and wishing to file a complaint against four officers" he stated were "trying to kill [him]"; a letter from another inmate who complained of being "harassed and threatened by both staff and other inmates" as a result of his status "as a witness for the State Attorney's Office"; an inquiry on behalf of an inmate who feared for his safety at FSP because he had murdered a corrections officer at another Florida correctional institute more than 15 years earlier; a letter from a death row inmate to the Florida Department of Law Enforcement, asking it to investigate his claims that supervisory staff at FSP failed to investigate allegations that prison officials assigned to death row permitted a violent inmate to be out of his cell without restraints so that he could threaten and intimidate other inmates; letters from several different inmates claiming that corrections officers had threatened to kill them; and a letter on behalf of an inmate discussing

allegedly criminal acts committed by various guards, and questioning the need for officers to continue to use force against an inmate once he had already been restrained by handcuffs and shackles.

Mathews produced evidence from which a jury could find that Crosby received copies of all the complaints referenced above concerning the abuse of inmates by guards at FSP, including allegations of abuse of Mathews. Furthermore, Crosby had been specifically warned by his predecessor about certain guards whose abuse of inmates was so severe that the prior warden felt one of them might kill an inmate if not stopped. Crosby, however, did not take steps to neutralize those guards and on at least one occasion sought to give one of the guards preferential treatment in housing. Mathews also presented evidence that Crosby had a reputation for being a "hands-off" warden; regularly delegated responsibility for his office's grievance response management to his secretary; and failed to keep guards with known records of alleged abuse away from assignments near at-risk inmates, such as those on X-wing.

This evidence, when taken together, is more than adequate to entitle Mathews to proceed to trial and show that inmate abuse at the hands of guards was not an isolated occurrence, but rather occurred with sufficient regularity as to demonstrate a history of widespread abuse at FSP. The facts presented, if found by a jury, sufficiently support a conclusion that Crosby knew of the widespread abuse and was "on notice of the need to correct or to stop" abuse by officers. *Cottone,* 326 F.3d at 1362.

The same evidence, again taken together and in the light most favorable to Mathews, is sufficient to allow a

jury to consider whether Crosby had established customs and policies that resulted in deliberate indifference to constitutional violations and whether Crosby failed to take reasonable measures to correct the alleged deprivations. *Id.* at 1360; *see Smith v. Brenoettsy,* 158 F.3d 908, 912-13 (5th Cir. 1998) (dismissing warden's appeal of denial of summary judgment in light of factual disputes as to warden's knowledge of substantial risk and reasonableness of warden's response where plaintiff, who was stabbed by a prison guard, sent letters to warden complaining of verbal abuse and threats by guard, and warden responded that sheer volume of unsubstantiated complaints made investigation of every complaint unreasonable).[10]

II. Clearly Established Law

Crosby argues that even if Mathews can establish a constitutional violation, Crosby is protected by qualified immunity because Mathews has failed to show that it was clearly established at the time of the beatings that a warden could face liability under § 1983 predicated on his failure to take reasonable steps in the face of a history of widespread abuse or his adoption of custom or policies which resulted in deliberate indifference. We disagree. By 1999, it was clearly established that a warden, the person

[10] Mathews also asserts that he was unconstitutionally denied adequate medical care, and that Crosby is liable for this constitutional violation under his supervisory liability. Mathews sets forth little, if any, facts relating to a causal connection between Crosby's actions and the alleged constitutional deprivation in the denial of medical care. All of Mathews' allegations concern the beatings on X-wing and the culture of violence at FSP. Accordingly, Mathews has failed to allege a claim for § 1983 supervisory relief against Crosby for the denial of medical care.

charged with directing the governance, discipline, and policy of the prison and enforcing its orders, rules, and regulations would bear such liability. *See, e.g., LaMarca v. Turner,* 995 F.2d 1526, 1539 (11th Cir. 1993) (holding that prison warden could face liability when his failure to take appropriate measures to improve prisoner safety created a climate that preordained the ensuing violence); *Fundiller v. City of Cooper City,* 777 F.2d 1436, 1443 (11th Cir. 1985) (holding that safety director whose responsibility included disciplining police officers and setting police department policy could be liable for failing to take corrective steps in the face of a pattern of excessive force engaged in by officers); *see also Skrtich,* 280 F.3d at 1303 (stating that by 1998 "precedent clearly established that government officials may not use gratuitous force against a prisoner who has been already subdued or, as in this case, incapacitated"); *Bruce v. Wade,* 537 F.2d 850, 853 (5th Cir. 1976) (a violation of § 1983 is clearly stated by the unjustified beating of an inmate at the hands of prison officials).

III. Award of Costs

Initially, because we reverse the summary judgment as to Crosby, we vacate any judgment of costs awarded to him. On remand, Giebeig may move for costs, consistent with our discussion of indigency below.

As to the other costs awarded, Mathews objects: 1) to any costs, except to those costs awarded to James Poston, because the magistrate judge improperly "assisted" the Defendants by requesting an additional filing; and 2) to the failure of the district court to reduce the amount of costs given that he is indigent.

We reject as meritless Mathews' first argument that the magistrate judge improperly "assisted" the Defendants by allowing them to submit an additional filing to address Mathews' indigency. Moreover, Mathews failed to file objections to the magistrate judge's order within the ten days required by Federal Rule of Civil Procedure 72(a). Thus, Mathews failed to timely assert this claim.

As to Mathews' second claim that the costs should be reduced based on his indigence, we review a district court's decision about whether to award costs to the prevailing party for abuse of discretion.[11] *Chapman v. Al Transp.*, 229 F.3d 1012, 1023-24 (11th Cir. 2000). The Defendants, having obtained from Mathews a voluntary dismissal with prejudice, are considered prevailing parties. *See also Sequa Corp. v. Cooper*, 245 F.3d 1036, 1037-38 (8th Cir. 2001) (noting that voluntary dismissal without prejudice under Fed. R. Civ. P. 41(a)(1)(i) does not deprive a district court of authority to award costs) (citing *Cantrell v. Int'l Bhd. of Elec. Workers, Local 2021*, 69 F.3d 456, 458 (10th Cir. 1995) (en banc) (holding that district courts have discretion to award costs when a party dismisses an action, with or without prejudice)). An abuse of discretion occurs if the trial judge bases an award or denial upon findings of fact that are clearly erroneous. *Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1323 (11th Cir. 2004).

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[11] There is no question that Mathews timely filed objections relating to this claim, as the magistrate judge's order was issued on March 10, 2005, and Mathews objected on March 21, 2005, within the ten day limitation. *See* Fed. R. Civ. P. 6(a) (Saturdays and Sundays are excluded from computation of time when under eleven days).

Federal Rule of Civil Procedure 54(d)(1) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." Fed. R. Civ. P. 54(d)(1). Under Rule 54(d), there is a strong presumption that the prevailing party will be awarded costs. *Arcadian Fertilizer, L.P. v. MPW Indus. Serv., Inc.*, 249 F.3d 1293, 1296 (11th Cir. 2001). Such costs, however, may not exceed those permitted by 28 U.S.C. § 1920. *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1225 (11th Cir. 2002). Costs that may be awarded under § 1920 include: "(1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; [and] (4) fees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920.

Here, the magistrate judge's report and recommendation went through an extensive analysis of each individual cost under § 1920 and whether Mathews was entitled to a reduction of costs because of his indigence. As we explained in *Chapman*, a district court needs a "sound basis" to overcome the strong presumption that a prevailing party is entitled to costs. There was none in this case, and the magistrate judge thoroughly considered each cost of the awards individually. Accordingly, we affirm the costs to all parties, except to Crosby and Giebeig as set forth above.

CONCLUSION

Accordingly, the district court's order granting summary judgment in favor of Crosby is **REVERSED**, and in favor of Giebeig is **AFFIRMED**. The district court's order awarding costs is **REVERSED** to Crosby and Giebeig and **AFFIRMED** to all other parties.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WILLIE MATHEWS,

Plaintiff,

vs.

Case No.
3:99-cv-1117-J-32MMH

JAMES V. CROSBY, JR., et al.,

Defendants.

ORDER ON DEFENDANTS CROSBY'S AND GIEBEIG'S MOTIONS FOR SUMMARY JUDGMENT

(Filed Jan. 21, 2004)

I. Status

This case is before the Court on Defendant Crosby's Motion for Summary Judgment (Doc. 343) and Defendant Giebeig's Motion for Summary Judgment (Doc. 341). Defendants Crosby and Giebeig ("defendants") filed supporting memoranda of law with attachments (Docs. 342, 344) as well as other supporting materials (Docs. 345, 345, [sic] 347, 348, 369). Plaintiff filed an omnibus memorandum of law in opposition to both motions (Doc. 370) and other supporting materials (Doc. 375).

In his second amended complaint, plaintiff Willie Mathews, an inmate of the Florida penal system who is represented by counsel, has named as defendants several Florida State Prison ("FSP") guards, officials and medical care providers alleging a variety of causes of action related to instances of alleged excessive use of force against

plaintiff which resulted in plaintiff sustaining a broken jaw, among other injuries. *See* Doc. 190 (Second Amended Complaint). Defendant James V. Crosby, Jr. was the FSP Warden at the relevant time and defendant Tim Giebeig was the FSP Inspector General. Plaintiff alleges that Crosby acted with deliberate indifference to a substantial risk of serious harm faced by plaintiff while housed on X-Wing, that Crosby failed to properly train and supervise his subordinates, to properly investigate the beatings allegations, and to improve the conditions of confinement (Count II). Plaintiff alleges Giebeig ignored or failed investigate the claimed abuse, was deliberately indifferent to the risks involved in housing plaintiff on X-Wing, and recklessly declined to improve the conditions of confinement (Count III). Plaintiff further alleges that both Crosby and Giebeig were involved in a conspiracy with the other defendants to deprive plaintiff of his Eighth and Fourteenth Amendment rights (Count VI) and that the actions of Crosby, Giebeig and the other defendants constitute an intentional infliction of emotional distress (Count VIII).[1]

Both Crosby and Giebeig have moved for summary judgment claiming that qualified immunity bars plaintiff's § 1983 claims; plaintiff has failed to demonstrate sufficient facts to support any of his causes of action; the Court does not have jurisdiction over plaintiff's state law claim for intentional infliction of emotional distress; and plaintiff is precluded from pursuing suit against Crosby and Giebeig because he failed to exhaust administrative remedies.

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[1] Neither Crosby nor Giebeig are named in Counts I, IV, V, or VII of plaintiff's Second Amended Complaint.

II. Procedural Issues

As part of his response in opposition to defendants Crosby and Giebeig's summary judgment motions, plaintiff has filed a motion for relief under Rule 56(f) and motion to compel discovery of Rhonda Horler's deposition (Doc. 370). Defendants have filed a response in opposition (Doc. 376).

Rule 56(f), Federal Rules of Civil Procedure, allows the Court to defer consideration of a motion for summary judgment if the "party opposing the motion" "cannot for the reasons stated" present facts "essential to justify the party's opposition. . . ." The Court, if it so finds, may continue the matter to allow further discovery or other development of the summary judgment record. In *Reflectone, Inc. v. Farrand Optical Co., Inc.*, 862 F.2d 841, 843 (11th Cir. 1989), the Court held that "as a general rule summary judgment should not be granted until the moving party opposing the motion has had an adequate opportunity to conduct discovery." However, the Court also stated that "[t]he party seeking to use rule 56(f) may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, but rather he must specifically demonstrate how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Id.* (citations and quotations omitted). *See Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1280 (11th Cir. 1998).

Plaintiff first seeks the right to depose two of defendants' affiants, Fred Schuknecht and Eugene Ross. These affiants are relevant only to the exhaustion of administrative remedies issue. However, because the Court has determined not to revisit its previous ruling on exhaustion

of remedies (Doc. 184) (which was favorable to plaintiff), it is unnecessary for plaintiff to depose these affiants.

Second, plaintiff seeks to depose Rhonda Horler, administrative assistant to defendant Crosby when he was Warden at FSP. However, plaintiff has failed to demonstrate why Ms. Horler's deposition is necessary to oppose defendants' summary judgment motions. Moreover, plaintiff's excuse for not taking Ms. Horler's deposition during the discovery period (which was extended several times) is unconvincing.

Finally, plaintiff contends that he still has not received all of the responsive documents which non-party Florida Department of Corrections was ordered to produce. As all parties know, the issue of DOC production has been an ongoing battle and the Court has intervened on a number of occasions. However, plaintiff has not specified which DOC documents have not been produced and what relevance those documents would have on the motions for summary judgment. At the time plaintiff filed his Response in Opposition to the Motion for Summary Judgment (Doc. 370) on December 19, 2003, plaintiff stated that he was "working on a separate further Motion for Order to Show Cause [regarding the DOC documents], *which Plaintiff believes will be completed by next week.*" (emphasis added). It is now mid-January 2004, with trial upcoming in February, and still plaintiff has not filed this promised motion for order to show cause. While the Court is skeptical whether the motion for order to show cause would convince the Court to delay ruling on the motions for summary judgment, since plaintiff has not filed the motion the Court does not have to make this decision. Moreover, the Court can wait no longer.

While discovery in this case was unnecessarily difficult, the Court did give the parties several extensions of the discovery deadline and made clear that the summary judgment deadline, pretrial and trial dates finally arrived upon were going to be enforced. Moreover, plaintiff has fallen far short of demonstrating entitlement to relief under Rule 56(f), Federal Rules of Civil Procedure. Therefore, the Court will **deny** plaintiff's Motion for Relief Under 56(f) and to Compel Discovery of Rhonda Horler's Deposition (Doc. 370). However, the Court will **grant** plaintiff's Motion to File an Excess Page Memorandum (Doc. 370) and will consider plaintiff's Omnibus Memorandum in Opposition to Crosby and Giebeig's Motions for Summary Judgment (Doc. 370) to be properly filed.

With this done, the Court will now proceed to the merits of defendants' summary judgment motions.

III. Summary Judgment Standard

"The entry of summary judgment is only appropriate when there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Schoenfeld v. Babbitt,* 168 F.3d 1257, 1264 (11th Cir. 1999) (internal quotation and citations omitted). In reviewing the record, the Court views the evidence in the light most favorable to the non-moving party. *See id.* While the Court must "resolve all reasonable doubts in favor of the non-moving party," it is not required "to resolve *all* doubts in such a manner." *Earley v. Champion Int'l Corp.,* 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original) (internal quotation omitted).

In deciding a motion for summary judgment by a defendant, "'[t]he mere existence of a scintilla of evidence

in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "Where as here discovery has been conducted, 'there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.'" *Id.* (quoting *Anderson*, 477 U.S. at 249-50). "'If the evidence is *merely colorable*, or is *not significantly probative*, summary judgment may be granted.'" *Id.* (quoting *Anderson*, 477 U.S. at 249-50) (emphasis in original).

"To the extent that affidavits submitted in opposition to a motion for summary judgment merely reiterate allegations made in the complaint, without providing specific factual information made on the basis of personal knowledge, they are insufficient." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000).

IV. Discussion

In these motions by defendants Crosby and Giebeig, we are not dealing with the liability of the guards and other correctional personnel who are alleged to have either personally participated in or observed the beatings and other abuse that plaintiff alleges. These motions deal only with the different issue of whether defendant Crosby, who at the time was the Warden at FSP, or defendant Giebeig, who was the FSP Inspector General, are liable under the facts of this case.

Plaintiff's section 1983 claims arise under the Eighth Amendment.[2]

> "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, 828, 114 S. Ct. 1970, 1974, 128 L.Ed.2d 811 (1994); *see Helling v. McKinney,* 509 U.S. 25, 113 S. Ct. 2475, 125 L.Ed. 2d 22 (1993).
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> . . .
>
> "An Eighth Amendment violation will occur when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not 'respond[] reasonably to the risk'. . . ." *Marsh v. Butler County, Ala.,* 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc), *quoting Farmer,* 511 U.S. at 844, 114 S. Ct. at 1982-83. "[T]o survive summary judgment on his section 1983, Eighth Amendment claim, [Plaintiff] was required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." *Hale v. Tallapoosa County,* 50 F.3d 1579, 1592 (11th Cir. 1995).

Carter v. Galloway, ___ F.3d ___, 2003 WL 22938549, at *2 (11th Cir. Dec. 15 2003).

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[2] While the Second Amended Complaint alleges § 1983 claims based upon both the Eighth and Fourteenth Amendments, the claims are properly denoted as Eighth rather than Fourteenth Amendment claims. *See Graham v. Connor,* 490 U.S. 386, 395 n. 10 (1989). *See also Whitley v. Albers,* 475 U.S. 312, 327 (1986). In any event, the standards are the same whether plaintiff's claims are analyzed under the Eighth or Fourteenth Amendments. *See Cottone v. Jenne,* 326 F.3d 1352, 1355 n. 4 (11th Cir. 2003).

Because plaintiff seeks to hold defendants Crosby and Giebeig liable for their acts as supervisory officials, additional legal principles are at play:

> "It is well established in this Circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior or vicarious liability." *Hartley v. Parnell,* 193 F.3d 1263, 1269 (11th Cir. 1999) (internal quotation marks and citation omitted); *Gonzalez [v. Reno],* 325 F.3d [1228, 1234], 2003 WL 1481583, at *4 [11th Cir. 2003] (concluding supervisory officials are not liable on the basis of respondeat superior or vicarious liability). Instead, supervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation. *Gonzalez,* 325 F.3d at [1234], 2003 WL 1481583, at *5; *Brown v. Crawford,* 906 F.2d 667, 671 (11th Cir. 1990). The necessary causal connection can be established "when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation and he fails to do so." *Gonzalez,* 325 F.3d at [1234], 2003 WL 1481583, at *5 (quoting *Braddy v. Fla. Dept. of Labor & Employment,* 133 F.3d 797, 802 (11th Cir. 1998)); *Brown,* 906 F.2d at 671. Alternatively, the causal connection may be established when a supervisor's "'custom or policy . . . result[s] in deliberate indifference to constitutional rights'" or when facts support "an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *Gonzalez,* 325 F.3d at

> [1235], 2003 WL 1481583, at *5 (quoting *Rivas v. Freeman,* 940 F.2d 1491, 1495 (11th Cir. 1991)); *Hartley,* 193 F.3d at 126[9]; *see also Post v. City of Ft. Lauderdale,* 7 F.3d 1552, 1560-61 (11th Cir. 1993). *"The standard by which a supervisor is held liable in [his] individual capacity for the actions of a subordinate is extremely rigorous."* *Gonzalez,* 325 F.3d at [1234], 2003 WL 1481583, at *4 (internal quotation marks and citation omitted).

Cottone v. Jenne, 326 F.3d 1352, 1359 (11th Cir. 2003) (emphasis added).

The Court has undertaken a review of the entire record concerning Crosby's and Giebeig's involvement. In doing so, the Court has reviewed all facts and all reasonable inferences therefrom in the light most favorable to the non-moving party, as required by summary judgment practice. *See e.g., Pennington v. City of Huntsville,* 261 F.3d 1262, 1265 (11th Cir. 2001). Using this standard, the evidence as to defendant Crosby is that he was aware that the plaintiff was at Florida State Prison; that a former Warden, McAndrew, had told Crosby that certain guards (including defendant Timothy Thornton) were abusive to prisoners; that Crosby later promoted some of these guards; that Crosby permitted his secretary to handle certain paperwork associated with complaints by inmates concerning abuse without reading these documents himself; that Crosby decided to end the practice of videotaping cell extractions even though they were thought by McAndrew and others to keep the prison guards' behavior in line and make it less likely that guards would abuse prisoners; that plaintiff's mother called Crosby to try to tell him that her son was being abused; and that Crosby and Giebeig

discussed Mathews' situation sometime after the abuse was alleged to have occurred.

With respect to Giebeig, the evidence stated in the light most favorable to the plaintiff is that plaintiff's mother called Giebeig (after the alleged abuse occurred concerning her son's situation but Giebeig failed to act promptly; that Giebeig lied to plaintiff's mother by telling her that plaintiff was fine; that Giebeig had been disciplined for failure to file a use of force report 20 years ago; that Giebeig had not substantiated any claim of abuse in the time he had been an inspector; that Giebeig went along with Crosby's decision to stop videotaping cell extractions; that Giebeig did not check with the medical staff to inquire about possible substantiation of guard abuse; that Giebeig did not begin to investigate the Mathews case promptly; and that Giebeig knew that guards sometimes worked on use of force reports together.[3]

The Court is also aware of the testimony of both the former Warden McAndrew and plaintiff's expert Riveland concerning what McAndrews and Riveland believe to be

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[3] The Court can find no facts in the record to support plaintiff's claim that Giebeig had ignored abuse complaints on X-Wing in the past (plaintiff's record citations to his second supplemental interrogatory responses reveal only conclusory statements) nor has plaintiff created an issue of fact as to Giebeig's failure to see to it that Mathews received proper medical care. While the record reflects that there was a delay between the reporting of Mathews' jaw injury and his transportation to an outside facility for further medical treatment, the record also demonstrates that plaintiff was receiving medical care in this interim period at the prison. Prison officials, such as Giebeig, who are not medical professionals, may "rely on the decisions of trained professionals concerning the medication and care to be given inmates." *Waldrop v. Evans*, 681 F. Supp. 840, 848 (M.D. Ga. 1988), *aff'd* 871 F.2d 1030 (11th Cir. 1989).

failures on the part of Crosby and Giebeig in performing their responsibilities both generally and specifically vis-a-vis plaintiff Mathews.

After carefully considering this evidence, the Court concludes that plaintiff has failed to create a genuine issue of material fact concerning Crosby's and Giebeig's liability under § 1983 for the alleged constitutional violations. Viewing every inference in the light most favorable to plaintiff, there may be evidence in this record that Crosby and Giebeig were negligent; however, mere "negligent failure to protect an inmate from attack does not justify liability under § 1983. . . ." *Brown v. Hughes,* 894 F.2d 1533, 1537 (11th Cir. 1990); *Carter,* 2003 WL 22938549, at *2. *See Thomas v. City of Clanton,* 285 F.Supp.2d 1275, 1284 (M.D. Ala. 2003) ("while [the police chief] may have been negligent with regard to supervision of [a subordinate police officer], [the police chief's] actions were not 'constitutionally inadequate' for § 1983 purposes") *citing Braddy v. Fla. Dept. of Labor & Employment,* 133 F.3d 797, 802 (11th Cir. 1998).

As a matter of law, the record fails to establish that either Crosby or Giebeig "personally participate[d] in the alleged unconstitutional conduct" or that "there is a causal connection between the actions of [Crosby or Giebeig] and the alleged constitutional deprivation," *i.e.*, the alleged abuse of plaintiff by various subordinate guards. *Cottone,* 326 F.3d at 1359. There is also insufficient record evidence of either a "history of widespread abuse" or a "custom or policy" which resulted in deliberate indifference to constitutional rights. *Id.* Finally, there are no facts which support an inference that either Crosby or Giebeig "directed [their] subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop

them from doing so." *Id.* While the record may fairly indicate that both Crosby and Giebeig were generally aware of a potential problem that guards would abuse inmates, this "generalized awareness of risk" is insufficient; there are no "specific facts from which an inference could be drawn that a substantial risk of serious harm exist[ed]" and that Crosby or Giebeig actually "dr[e]w that inference." *Carter,* 2003 WL 22938549, at *2. Thus, the Court's reading of the recent Eleventh Circuit case law, primarily *Cottone* and *Carter,* convinces the Court that the record here is insufficient as a matter of law to create liability for either Crosby or Giebeig under § 1983. *See Cottone,* 326 F.3d at 1359 ("the standard by which a supervisor is held liable in [his] individual capacity for the actions of a subordinate is extremely rigorous") (citations omitted). The Court will **grant** summary judgment in favor of defendants Crosby and Giebeig on the substantive § 1983 claims, Counts II and III, respectively.[4]

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[4] Because the Court has ruled that plaintiff has failed to create a triable issue concerning whether defendants Crosby and Giebeig committed a constitutional violation, the Court need not address the second prong of defendants' qualified immunity argument: that the law was not clearly established in plaintiff's favor *See, e.g., Carter,* 2003 WL 22938549, at *4 n. 10. Moreover, the Court recognizes that it previously denied these defendants' motion to dismiss both the federal and state claims against them (Doc. 66) and that the Eleventh Circuit affirmed that denial. *Mathews v. Crosby,* Case No. 01-10277 (11th Cir. Jan. 7, 2002) (unpub. decision). However, in so doing the Eleventh Circuit made clear that it was only affirming the district court's denial of the motion to dismiss "at the 12(b)(6) stage." Obviously, the factual record has now been developed and we are no longer dealing just with allegations but with evidence. This Court now holds that defendants Crosby and Giebeig are entitled to summary judgment as a matter of law pursuant to Rule 56, Federal Rules of Civil Procedure.

The Court will also **grant** Crosby and Giebeig summary judgment on the Count VI § 1983 conspiracy count, finding an absence of evidence that Crosby and Giebeig reached any agreement with each other or others to deny plaintiff his constitutional rights. *See, e.g., Bailey v. Board of County Com'rs of Alachua County, Fla.,* 956 F.2d 1112, 1122 (11th Cir. 1992). *See also Fullman v. Graddick,* 739 F.2d 553, 556-57 (11th Cir. 1984) ("[i]n civil rights cases, conclusory, vague and general allegations of conspiracy are insufficient").[5]

Finally, the Court finds no issue of material fact with respect to plaintiff's Count VIII intentional infliction of emotional distress count against Crosby and Giebeig. The elements of a claim for intentional infliction of emotional distress under Florida law are: "(1) extreme and outrageous conduct; (2) an intent to cause, or reckless disregard to the probability of causing, emotional distress; (3) severe emotional distress suffered by the plaintiff; and (4) proof that the conduct caused the severe emotional distress." *Gonzalez-Jimenez de Ruiz v. United States,* 231 F. Supp. 2d 1187, 1199 (M.D. Fla. 2002). Whether conduct rises to the level of being extreme and outrageous is a question of law for a court to decide. *Id.* To state a claim with regard to the "extreme and outrageous conduct" element, "a plaintiff must allege conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Decius v. Nat'l Serv. Indus., Inc.,* 2001 WL 1621924, *2 (S.D. Fla. 2001) (citing *Metro. Life Ins. Co. v. McCarson,* 467 So. 2d 277, 278-79

[5] This ruling does not affect the Count VI conspiracy count against all other defendants.

(Fla. 1985)). This is an "incredibly high standard." *Geidel v. City of Bradenton Beach,* 56 F. Supp. 2d 1359, 1368 (M.D. Fla. 1999). Plaintiff has not met this "incredibly high standard" with respect to these defendants.[6]

Accordingly, it is hereby

ORDERED:

1. Defendant Crosby's Motion for Summary Judgment (Doc. 343) is **GRANTED.**[7] The Clerk shall withhold entry of judgment until the conclusion of the case.

2. Defendant Giebeig's Motion for Summary Judgment (Doc. 341) is **GRANTED**. The Clerk shall withhold entry of judgment until the conclusion of the case.

3. Plaintiff's Motion for Relief Under Rule 56F (Doc. 370-1) and to Compel Discovery of Rhonda Horler's Deposition (Doc. 370-2) are **DENIED**. Plaintiff's Motion for Leave to File an Excess Page Memorandum (Doc. 370-3) is **GRANTED**.

4. Defendants', Crosby's and Giebeig's, Motion to Exclude Plaintiff's Corrections/Prison Expert, Chase Riveland (Doc. 329) is **MOOT**.

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[6] Again, this ruling does not affect the Count VIII intentional infliction claim against the other defendants.

[7] The Court is aware that many of the lawyers in this case are also counsel in *Valdes v. Crosby,* Case No. 3:01-cv-799-J-32HTS, and that some of the issues in this case are similar to those in *Valdes.* The Court wants everyone to be absolutely clear: the Court's decision to grant summary judgment in favor of Crosby and Giebeig in this case should not be viewed nor used as precedent in the *Valdes* case.

DONE AND ORDERED at Jacksonville, Florida this 20th day of January 2004.

/s/ Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

s.
Copies:
counsel of record

APPENDIX C

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 05-12515-CC

WILLIE MATHEWS,

Plaintiff-Appellant,

versus

JAMES V. CROSBY,
TIM GIEBEIG,
SGT. HALL,
SGT. CROCKETT,
C.O. YOUNG, in their individual capacities, et al.,

Defendants-Appellees,

C.O. DOBSON, et al.,

Defendants.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed May 10, 2007)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, BARKETT and GOODWIN,* Circuit Judges.

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* Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

75

(2)

No. 07-86

IN THE
Supreme Court of the United States

JAMES V. CROSBY, JR.,
Petitioner,

v.

WILLIE MATHEWS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 2007

QUESTION PRESENTED

Whether the Eleventh Circuit erred in holding that a prison warden was not entitled to qualified immunity for abuse of an inmate by correctional officers under his supervision, where the warden assigned correctional officers about whose abuse of prisoners he had been warned to areas with direct contact with high-risk inmates; delegated abuse-of-force complaints to his secretary; and discontinued a procedure used by his predecessor to reduce problems during uses of force.

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INTRODUCTION

Petitioner Crosby's sole argument for review is that the Eleventh Circuit erred in its application of the second step of the *Saucier v. Katz* test for qualified immunity. Although the Eleventh Circuit's discussion of the second step of the *Saucier* inquiry was brief, it set forth the clearly established law on supervisory liability that, in 1999, gave Crosby fair warning that his actions (or lack thereof) violated constitutional rights. Crosby's actions were not objectively legally reasonable, and the court of appeals' decision was correct.

STATEMENT OF THE CASE

A. Factual Background

Petitioner James V. Crosby used to be the warden at Florida State Prison (FSP). When Crosby first arrived at FSP, the previous warden, Ron McAndrew, warned Crosby about guards who McAndrew believed abused inmates and needed to be kept out of high-risk areas, such as X-Wing, which housed inmates with serious disciplinary problems, because McAndrew "was afraid they would kill an inmate." App. 9. McAndrew offered to sit down with Crosby for a "desk audit" to discuss problems at FSP, because, according to McAndrew, FSP "had a notorious reputation for the beating of inmates." Crosby refused the audit. *Id.* at 11. Instead, McAndrew left Crosby a written list of guards he believed were abusive. *Id.* at 9.

Timothy Thornton was one of the guards about whom McAndrew specifically warned Crosby. *Id.* Not long before Crosby became warden, Thornton had been involved in an incident in which an inmate on X-Wing was beaten so severely that he had to be airlifted to a

hospital, where he stayed for nine days, suffering from chest trauma, including multiple broken ribs and hemopneumothorax; back, shoulder, and knee injuries; scalp laceration; abdominal trauma; and post-trauma anemia. *See Skrtich v. Thornton*, 280 F.3d 1295, 1300 (11th Cir. 2002). McAndrew had moved Thornton away from X-Wing and other areas where Thornton might have the opportunity to abuse inmates, and specifically warned Crosby that "this guy is dangerous. . . . . You need to get him off the payroll." App. 10. After Crosby became warden, however, Thornton was promoted to Captain, assigned to areas of direct contact with inmates, and personally selected by Crosby to receive free officer housing, bypassing a waiting list of other officers. *Id.*

Crosby also played an instrumental role in bringing Montrez Lucas, an officer with whom he had previously worked, to FSP. Lucas had been disciplined before being moved to FSP, bragged about being suspended—but not fired—for using excessive force, and was later investigated for having taught correctional officer trainees, in June 1999, to engage in practices such as falsifying use-of-force forms, taking "free shots" at inmates who were handcuffed, using chemical agents on inmates after they became compliant, instructing trainees about which parts of the body could be kicked without leaving boot prints, and bringing inmates to the medical ward for minor injuries and then beating them severely after they were returned to their cells. *Id.* at 11.

In contrast to his treatment of Thornton and Lucas, Crosby transferred away from FSP an assistant warden whom McAndrew had hired because he

believed she would actively pursue the goal of reducing inmate abuse. *Id.* at 12.

While Crosby was warden, he received numerous abuse-of-force complaints and inquiries about prison conditions. For example, he was sent multiple letters from inmates stating that corrections officers had threatened to kill them; a letter from an inmate's family alleging the inmate was beaten by a sergeant and taken to the hospital and that they had not had contact with him since; and a letter on behalf of an inmate questioning the need for guards to continue using force on an inmate after he was handcuffed and shackled. *Id.* at 15-16.

Notably, Crosby did not read abuse-of-force complaints or use-of-force forms. Although McAndrew had informed Crosby that he had reason to believe that Crosby's secretary was obstructing inmate abuse investigations, Crosby delegated responsibility for dealing with the complaints to that secretary. *Id.* at 14.

Crosby also discontinued a practice that prior wardens had been using to cut down on problems during uses of force. McAndrew and his predecessor had videotaped "cell extractions," removals of prisoners from their cells when they refused to be restrained by handcuffs and leg irons. Although McAndrew believed videotaping cell extractions encouraged officers to behave more professionally, Crosby stopped the practice. The court of appeals found that "[v]iewing all facts and inferences in the light most favorable to Mathews, it could be inferred that Crosby's action in discontinuing the use of the cameras once he became warden, despite knowledge that specific FSP officers were suspected of unwarranted assaults upon inmates,

sent a message to corrections officers that the administration at FSP was going to permit further abuse of inmates." *Id.* at 12-13.

On July 4, 1999, the Florida Department of Corrections transferred Willie Mathews from Hamilton Correctional Institution to FSP, where he was assigned a cell on X-Wing. Even before being escorted to his cell, Mathews was assaulted by FSP correctional officers. Over the following week, correctional officers repeatedly beat Mathews, resulting in serious injury, including a broken jaw. *Id.* at 4-5. Timothy Thornton oversaw at least one of the beatings. *Id.* at 9.

On July 17, 1999, correctional officers at FSP, once again including Timothy Thornton, beat to death Frank Valdes, another X-Wing inmate. Only after Valdes was killed was Mathews transferred out of FSP and provided surgery for his broken jaw. *Id.* at 8.

B. Proceedings Below

Mathews brought this action under 42 U.S.C. § 1983 for violation of his rights under the Eighth and Fourteenth Amendments. Crosby filed a motion to dismiss based on qualified immunity, which the district court denied. The court of appeals affirmed the denial. Crosby then filed a motion for summary judgment, which the district court granted. *Id.* at 22-36.

The court of appeals reversed. It began by explaining that qualified immunity gives "complete protection to government officials" when they have not violated clearly established rights of which a reasonable person would have known. *Id.* at 4 (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002)). It then set forth the Court's two-step test for

determining whether qualified immunity applies: "First, we ask 'do the facts alleged show the government official's conduct violated a constitutional right?'" *Id.* at 5 (quoting *Saucier v. Katz*, 533 U.S. 194 (2001)). "If a constitutional violation is established . . . we then must determine whether such conduct would have violated federal law that was clearly established at the time of the incident." *Id.*

Turning to the first question under the qualified immunity inquiry, the court set forth the standards for supervisory liability under § 1983. *Id.* at 6. The court then detailed the extensive evidence demonstrating that Crosby was on notice of a history of widespread abuse at FSP, that he failed to correct the situation, and that he established customs or policies resulting in deliberate indifference to inmates' constitutional rights. At the end of this factual description, the Court summarized:

> [A] jury could find that Crosby received copies of . . . [complaints] concerning the abuse of inmates by guards at FSP, including allegations of abuse of Mathews. Furthermore, Crosby had been specifically warned by his predecessor about certain guards whose abuse of inmates was so severe that the prior warden felt one of them might kill an inmate if not stopped. Crosby, however, did not take steps to neutralize those guards and on at least one occasion sought to give one of the guards preferential treatment in housing. Mathews also presented evidence that Crosby had a reputation for being a "hands-off" warden; regularly delegated

> responsibility for his office's grievance response management to his secretary; and failed to keep guards with known records of alleged abuse away from assignments near at-risk inmates, such as those on X-wing.

Id. at 16. The court found that these facts, if found by the jury, were sufficient to establish a constitutional violation. *Id.* at 16-17.

Turning to the second step of the qualified immunity inquiry—whether Crosby had violated clearly established law—the court determined that, by 1999, it was clearly established that a warden could face liability for behavior such as Crosby's. *Id.* at 17-18.

Crosby filed a petition for rehearing en banc, which was denied by the Eleventh Circuit, without any judge requesting that the court be polled on whether to rehear the case. *Id.* at 37-38.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit Correctly Stated the Applicable Law Regarding Qualified Immunity.

In considering whether Crosby was entitled to qualified immunity, the Eleventh Circuit explained that "qualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person should have known." App. 4 (quoting *Lee v. Ferraro*, 248 F.3d at 1193-94). Petitioner does not question that the Eleventh Circuit properly stated this standard, nor that it properly identified the two-step test for determining whether a government official is

entitled to qualified immunity set forth by this Court in *Saucier v. Katz*, 533 U.S. 194.

Similarly, Petitioner does not claim that the decision below conflicts with decisions from other circuits, or with opinions from state courts of last resort, or that it has departed from the accepted course of judicial proceedings. And Petitioner has not suggested any confusion among the lower courts on how to apply the *Saucier* inquiry in supervisory liability cases.

Instead, Petitioner's request for further review is based on the argument that the court of appeals erred in its application of the *Saucier* inquiry. *See* Pet. at ii. The Eleventh Circuit properly applied the qualified immunity test in this case, but, even if it had not, Petitioner's disagreement with the court of appeals' application of the *Saucier* inquiry is not worthy of this Court's review. *See* S. Ct. R. 10.

B. The Eleventh Circuit Properly Applied This Court's Qualified Immunity Test.

Petitioner contends that the Eleventh Circuit erred by applying qualified immunity at too general a level and by failing to employ an objective legal reasonableness standard. *See* Pet. 7-8. In fact, however, the clearly established law set forth by the court of appeals had, as required by this Court, "sufficiently clear [contours]" that, under the circumstances of this case, Crosby reasonably should have known that his conduct violated the law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

1. Petitioner's argument (at 10-11) that the court of appeals failed to undertake the required "fact-specific inquiry," takes the Eleventh Circuit's discussion of

clearly established law out of context. That discussion followed an extensive account of the particular facts of this case. Although the court did not repeat those facts after setting forth the clearly established law, the court expressly recognized that the qualified immunity test required it to determine whether the government official's conduct violated clearly established law. App. 4. The opinion as a whole makes clear that the court of appeals concluded that Crosby's particular actions, undertaken in the "specific context of the case," *Saucier*, 533 U.S. at 201, violated the clearly established law it laid out.

2. The court of appeals' discussion of clearly established law did not contain just "an assertion that it was clearly established that supervisory liability could be imposed where there is a causal connection between a supervisor's actions and the claimed constitutional violation by subordinates" Pet. 9. Nor did it look at the law of supervisory liability "in the most general possible terms." *Id.* at 10. Rather, the court of appeals recognized that, by 1999, when Mathews was assaulted by the correctional officers, multiple sets of facts could demonstrate the causal connection necessary to establish supervisory liability—including failure to act in the face of a history of widespread abuse and the adoption of customs and policies that result in deliberate indifference to constitutional rights. The court concluded that the facts alleged in this case, if found by a jury, could support liability under one of those clearly established standards. The caselaw set forth by the court of appeals gave Crosby "fair warning" that his acts were unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

To be sure, in determining whether Crosby violated clearly established law, the court below did not cite cases requiring wardens to videotape cell extractions, accept desk audits from their predecessors, or not delegate abuse-of-force complaints to their secretaries. But the requirement that the clearly established law be considered at a level of specificity that a reasonable person would understand that what he is doing violates the law does "not [mean] that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson*, 483 U.S. at 640. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in decisional law may apply with obvious clarity to the specific conduct in question . . . ." *United States v. Lanier*, 520 U.S. 259, 271 (1997). Here, based on the clearly established law set forth by the Eleventh Circuit, a reasonable warden in Crosby's position should have known that his actions were illegal.

3. Petitioner contends that the court of appeals' decision"effectively results in improper denial of qualified immunity to *all* supervisory government officials." Pet. 27. But the court's brief discussion of qualified immunity cannot be divorced from its extensive description of the facts, which demonstrate that, given the state of the law in 1999, Crosby acted in a manner that a reasonable warden should have known was not lawful. Since the decision below, courts in the Eleventh Circuit have continued to grant qualified immunity to supervisors where—unlike in this case—clearly established law did *not* provide the supervisor with fair warning that his or her actions violated the Constitution. *See McGee v. Barrett*, 2007

WL 1799650, at *11-12 (N.D. Ga. June 19, 2007) (granting qualified immunity even though there was a genuine issue of material fact as to whether supervisor's actions were a constitutional violation); *Muhammad v. Wash. Mutual F.A.*, 2007 WL 1020840, at *4-5 (N.D. Ga. Mar. 28, 2007) (concluding that no constitutional violation took place, but even if it had, supervisor would be entitled to qualified immunity because he would not have been on notice that his actions violated constitutional rights).

C. The Decision Below Is Correct.

In 1999, when Mathews was assaulted by correctional officers under Crosby's supervision, it was clearly established that a supervisor could be held liable if a history of widespread abuse put the supervisor on notice of the need to take corrective action, and the supervisor failed to do so. *See, e.g.*, *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985) (holding that a Public Safety Director could be liable for an undercover police officer's use of unnecessary and unreasonable force, where the city's police officers had engaged in a pattern of excessive force during arrests, and the public safety director, although aware of the excessive force, had failed to take corrective steps). Despite the history of widespread abuse of inmates by FSP correctional officers, however, Crosby did not take corrective action. To the contrary, he promoted and gave preferential treatment to a guard about whom his predecessor had specifically warned him. It was also clearly established in 1999 that a supervisor could be held liable for a custom or practice that could be expected to result in, and in fact resulted in, deliberate indifference to constitutional rights. *See Rivas v. Freeman*, 940 F.2d

1491, 1495 (11th Cir. 1991) (holding sheriff liable on grounds that his failure to establish policies and procedures caused the plaintiff's arrest and unnecessary incarceration). Nonetheless, Crosby engaged in practices—such as discontinuing the practice of videotaping cell extractions and delegating responsibility for abuse-of-force complaints to his secretary—that resulted in such deliberate indifference.

Moreover, it was clearly established in 1999 that a prison official could be liable under § 1983 if he was deliberately indifferent to a substantial risk of serious harm, in that he knew about the risk of harm but failed to act, *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), including if he failed to reassign officers or other inmates known or alleged to be violent. *See Estate of Davis by Ostenfeld v. Delo*, 115 F.3d 1388, 1396 (8th Cir. 1997) (prison superintendent deliberately indifferent and liable for correctional officer's excessive use of force where superintendent had received complaints that officer used excessive force on other inmates and had been informed by district assistant for the fourth senatorial district of Missouri that corrections officer should be discharged or reassigned due to complaints that he had used excessive force against inmates); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583-84 (11th Cir. 1995) (sheriff could be found deliberately indifferent where he knew of history of inmate-on-inmate violence and did not pursue measures such as adequately supervising and monitoring inmates, adequately training jailers, and assigning inmates to bunks based on likelihood of violence); *LaMarca v. Turner*, 995 F.2d 1526, 1535-38 (11th Cir. 1993) (prison superintendent deliberately indifferent to prisoner safety where he knew of

unreasonable risk of violence but disregarded multiple means of addressing the risk, including failing "to transfer known assailants or inmates who should have been known assailants out of [the prison]"); *cf. Ware v. Jackson County, Missouri*, 150 F.3d 873, 885 (8th Cir. 1998) (finding causal connection between county's deliberate indifference to allegations of sexual misconduct and inmate's rape where prison director did not reassign correctional officer to floor that did not house female inmates or take other precautionary measures). Here, a jury could easily conclude that Crosby knew of the substantial risk of harm to inmates from the conduct of correctional officers, but he disregarded means of addressing that risk, including reassigning guards about whom he had been warned to areas where they would not have contact with at-risk prisoners.

Petitioner emphasizes that qualified immunity should be given to supervisory government officials "when they reasonably believe their actions are not unlawful,'" Pet. 13, but this case is not about "mistaken judgments." *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)). This case is about a warden who, despite having been explicitly warned about a guard, proceeded to promote that guard, give him preferential treatment, and allow him direct contact with at-risk prisoners; who did not bother to handle abuse-of-force complaints and use-of-force forms himself, but instead delegated them to his secretary, who his predecessor had believed was obstructing inmate abuse investigations; who discontinued videotaping cell extractions, a method former wardens had used to cut back on use-of-force problems; who the prison chaplain testified had a "hands-off" approach, thereby allowing the "good old boys" network of guards to mistreat

inmates, App. 13; who "sent a message to corrections officers that the administration at FSP was going to permit further abuse of inmates." *Id.* at 12-13. Crosby's actions were not objectively reasonable, and the court of appeals was correct in denying him qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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